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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.
No. 455

FAYE LYONS,

Petitioner,

vs.

ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

Statement of the Question Presented.

Respondent submits that under the rules of this Court the case presented is not one in which Petitioner is entitled to a Writ of Certiorari.

The only question presented is whether there is any substantial evidence to support the judgment based upon a jury verdict in favor of Respondent and against Petitioner in an action pleading an alleged libel, assertedly arising out of a cross-complaint for divorce, filed by Respondent against her husband, Ray Gilliland.

Statement of the Case.

The only issue here is: Was there, in the jury trial, evidence from which the jury could find (as it did) that Respondent's defense of privilege had been sustained? Respondent contends that the evidence was ample and this contention has been affirmed by the trial court and by the United States Court of Appeals.

The libel charged against Respondent was contained in her cross-complaint for divorce, in an action filed in the State of California. In her pleadings in said action Respondent alleged that her husband had committed adultery with Petitioner.

Petitioner brought an action against Respondent charging that said allegation was libelous. One of Respondent's defenses thereto was that said allegation was privileged under the provisions of Section 47 of the California Civil Code. Said code section reads, in pertinent part, as follows:

> "47. Privileged publication * * *: What constitutes "A privileged publication * * * is one made— * * * 2. In any * * * judicial proceeding * * *; provided, that an allegation or averment contained in any pleading * * * in an action for divorce * * * made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication * * * as to the person making said allegation or averment within the meaning of this section unless such pleading be verified * * * and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation * * * and unless such allegation * * * be material and relevant to the issues in such action * * *."

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Verification of the cross-complaint and materiality of the allegations to the issues were admitted.

The jury's verdict was for the Respondent, upon her defense of privilege. The Petitioner appealed from the judgment entered upon said verdict to the United States Court of Appeals for the Ninth Circuit. The judgment was affirmed.

In her appeal to the said Court of Appeals, Petitioner asserted only the following two specifications of error, both of which were directed to the sufficiency of evidence, to wit: that there was insufficient evidence to justify the jury's findings (1) that Respondent acted without malice, and (2) that Respondent had reasonable and probable cause for believing the truth of the allegations.

In her statement of "Questions Presented" herein, Petitioner apparently does not contend that the evidence is insufficient to justify the jury's finding that Respondent acted without malice. Since this issue is not raised herein it is assumed that Petitioner has waived this former specification of error and, that of the original two specifications of error, there now remains only one, to wit: that there was insufficient evidence to justify the jury's findings that Respondent had reasonable and probable cause for believing the truth of said allegations. The other questions presented herein by Petitioner are new questions, presented for the first time; none of which were presented as an issue in the said District Court or the Court of Appeals.

Respondent will answer, first, the only remaining of the original specifications of error, to wit: insufficiency of the evidence. Respondent will then answer the other questions presented herein by Petitioner for the first time.

ARGUMENT.

A. Sufficiency of the Evidence.

Contrary to Petitioner's contention, the evidence is sufficient to justify the jury's findings that Respondent had reasonable and probable cause for believing the truth of said alleged libelous allegations. The record in this case sets forth the information concerning the conduct of Petitioner with Respondent's husband, that Respondent had at the time she made the alleged libelous publication. Respondent's information consisted of: (1) the written "Statement of Blanche Lampert" [Pltf. Ex. 8, Rep. Tr. p. 306, lines 11-12]; (2) the information given to Respondent by her attorney; (3) what her neighbors told her, (4) and the information Respondent obtained in conversation with the witness Blanche Lampert [Rep. Tr. p. 30, lines 6-11; p. 34, lines 1-2].

The pertinent excerpts from the written "Statement of Blanche Lampert", made on November 2, 1955, and which "Statement" was known to Respondent prior to the publication of the alleged libel, are as follows:

> "Q. How long have you worked for Mr. Gilliland? A. We were there from the 1st of May until the last of September.
>
> Q. Of this year? A. Yes, . . .
>
> Q. How often would Mr. Gilliland have guests at his home when Mrs. Gilliland was around, were they ever there alone that you know of? A. Oh, sure, he had Faye Lyons from Miami . . ." (App. Op. Br. p. 16 in Court of Appeals.)
>
> "Q. What have you observed as to women being there? A. Well, Faye Lyons.

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Q. And when was that approximately? A. Well, let's see—in May when we first went there, I will tell you how I know it was before we went on our vacation and Faye was there, he was keeping her at that time up at Paradise Valley, because I cooked a steak dinner for them, Paradise Valley Guest Ranch.

Q. Just tell us what you observed. A. He got mad at Judge Blake and Phil Kent and all of them, and he went and stayed all night up there himself.

Q. Up where? A. At Paradise Valley, when Faye was there. She used to come down and stay until two and three o'clock in the morning. They used to sit in there and drink together and we was in our own bedroom out there, they were in there until two or three o'clock in the morning, then they went on a trip and came back.

Q. Who went on a trip? A. Mr. Gilliland and Faye, I don't know where they went, but anyway when they came back they brought Faye's boy back with them and it didn't work, and they got in a fight and Ray slapped her and she throwed a glass at him, Faye broke a glass on him.

Q. After they came back with the boy did she live there at the house that you know of? A. No, she took the boy up to Paradise Valley, only she was down there every day and I baby sat with the boy, or one of the neighbors did.

Q. Until what hour of the morning? A. Until two or three o'clock.

B. L.

Q. Was she intoxicated? A. Sure.

B. L.

~~Q. Both of them? A. Sure.~~

Q. Any other instances? A. Yes, then—

Q. Now, before we get away from here, what period of time would you say approximately that this woman was involved? A. Oh, from May until I would say June, she was here most of the summer . . ." (App. Op. Br. pp. 17, 18, 19 in Court of Appeals.)

At the trial in the District Court, Mrs. Lampert as a witness testified and she corroborated her written statement, including the excerpts above quoted. In summary she testified: that the Paradise Valley Guest Ranch was a form of motel near Gilliland's home [Rep. Tr. p. 217, lines 11 to 18]; that the trip that Petitioner and Gilliland took together was from Scottsdale, Arizona to Miami, Florida [Rep. Tr. p. 218, lines 1-3]; that Gilliland and Petitioner were alone at Gilliland's home almost every night until 2 or 3 o'clock in the morning and that she saw them drinking together [Rep. Tr. p. 220, lines 11-13]; that Gilliland stayed with Petitioner all night at the Paradise Valley Guest Ranch [Rep. Tr. p. 221, line 3, to p. 222, line 6]; that she saw him come out of Faye Lyons' room about 8 o'clock the next morning [Rep. Tr. p. 222, lines 1-6]; that Petitioner had a fight with Gilliland and threw a glass at him [Rep. Tr. p. 222, line 7, to p. 223, line 20]; that Gilliland boasted of his affairs with women and said that he wouldn't have them around if he "couldn't do anything" . . . he "wanted with them" [Rep. Tr. p. 225, line 18]; that Gilliland had affairs with other women (which showed Gilliland's propensities to the adultery charge) [Rep. Tr. p. 229, line 12, to p. 233, line 20]; that the witness saw Gilliland kissing Faye Lyons two or three times

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[Rep. Tr. p. 234, lines 4-6]. She also testified that she told Mr. Murphey, Respondent's attorney, about the girls who stayed with Gilliland and what they did and all of the other facts she had related in the trial as a witness [Rep. Tr. p. 235, lines 4-7].

Mr. William L. Murphey, the said lawyer representing Respondent, Mrs. Gilliland, in said divorce proceedings, and also a witness at the trial in this action, talked to the witness, Blanche Lampert, in 1955, and at that time the witness, Blanche Lampert, told Mr. Murphey in substance what she later testified to at the trial [Rep. Tr. p. 268, line 16, to p. 269, line 25]. Mr. Murphey related all of these facts to Respondent [Rep. Tr. p. 271, line 25, to p. 272, line 11]; and he gave Respondent his opinion relative to the inferences that could be drawn from these acts of Gilliland. Prior to the alleged libelous publication Mr. Murphey advised his client, the Respondent, that in his opinion, the above described acts and conduct of Gilliland and Petitioner were of such gravity as to constitute sufficient grounds upon which to charge adultery [Rep. Tr. p. 275, line 17, to p. 277, line 6].

Respondent, Mrs. Gilliland, testified that the information she had, concerning the conduct of her husband with Petitioner, at the time of making the alleged libelous publication in her said divorce cross-complaint, came from the witness Blanche Lampert and from her attorney, Mr. Murphey, and her Scottsdale neighbors [Rep. Tr. p. 299, line 22, to p. 300, line 11].

The jury was properly instructed by the District Court as to the law relative to a privileged publication. As the judges of the weight of the evidence, the

jury determined that from all of the information Respondent had at the time of the alleged libelous publication, she had reasonable and probable cause for believing the truth of her allegation that her husband, Ray Gilliland, committed adultery with the Petitioner. This finding by the jury has substantial evidence in its support. *Peterson v. Exum* (1960, 9th Cir.), 283 F. 2d 499, 502.

B. Other Questions Presented by Petitioner.

In her Petition for Certiorari, Petitioner sets forth in her Statement of the Case, eleven "Questions Presented."

Questions numbered 1, 2, 3, 9, 10 and 11, are questions pertaining to the sufficiency of the evidence. They have already been answered in this Brief.

The other questions in the Petition are for the first time presented in this litigation. They were neither presented nor argued in the District Court, at the trial, or on the motion for a new trial. They were not presented in the specifications of error taken to the United States Court of Appeals. These questions now will be answered in the order presented in the Petition for Writ of Certiorari.

Question No. 4, is whether the law of the State of California, as set forth in Section 47, of the Civil Code of said State, governs this case.

Because the basic right of free speech is guaranteed to all citizens, by the First Amendment to the Constitution of the United States, Petitioner's action for damages, for an alleged libel, perforce had to be, and was, based on the California Civil Code, Sections 45 and 47.

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To constitute a libel which is actionable, it must be a, "false and unprivileged" publication (California Civil Code, Sec. 45).

Under and subject to these statutes, Petitioner sued Respondent and had her day in court; in both the District Court and in the Court of Appeals, according to due process of law.

Petitioner failed to establish her case. Respondent established her defense of privilege.

Question No. 5, is whether the law of the case was established in the prior and first appeal in this action? The decision of the United States Court of Appeals, in said first appeal, to which Petitioner refers (*Gilliland v. Lyons,* 278 F. 2d 56) had before it the single question of whether or not the District Court had jurisdiction to grant the motion for a new trial. In this first appeal, the United States Court of Appeals did not pass upon the merits of the case. The Appellate Court decided only that the District Court had jurisdiction to grant the motion for a new trial. It was in the new trial of said action, this time before a jury, that judgment in the present case resulted. Before the said second trial, an amended answer was filed alleging truth of the allegations, and additional evidence was introduced thereon at the second trial.

Question No. 6, is "whether the Rule of *Erie v. Tompkins,* 304 U. S. 64; 82 L. ed. 1188, is binding in this case and requires the federal court to apply the law of the State of California as construed by the highest courts of that State."

This is exactly what the United States Court of Appeals did.

The facts in *Erie v. Tompkins,* do not in any way affect the judgment entered upon the jury's verdict in this case.

Question No. 7, is whether or not Petitioner was denied due process of law and equal protection of the laws, guaranteed by the Fourteenth Amendment of the Constitution, where the accusation of adultery was found to be privileged even if not true.

Under the law of the State of California the publication must be both *false and unprivileged* in order to constitute a libel (Civil Code of California, Sections 45 and 47). Privilege is a complete defense and if established (as it was in this case) the truth or falsity of the charge is immaterial. Truth and privilege are separate and distinct defenses. Under the law the District Court had jurisdiction to find that the publication was privileged without considering or making any finding as to its truth or falsity (*Snively v. Record Publishing Company,* 185 Cal. 565, 574; *Freeman v. Mills,* 97 Cal. App. 2d 161). The jury found, under the facts, privilege had been established.

Question No. 8, also pertains to Section 47 of the Civil Code of California. Petitioner contends it denies her due process of law and the equal protection of the laws, guaranteed by the Fourteenth Amendment of the Constitution of the United States.

On the contrary, it is this section of said California Civil Code that gave Petitioner the right to bring a libel action, based on allegations made in a prior civil action for divorce. Without the exception contained in the Code, the said allegation, under the law, would be privileged. Instead of violating due process of law

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and the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States, it was this Civil Code section 47, that gave Petitioner her day in court.

In Question No. 10, Petitioner contends that the Opinion of the Court of Appeals is based upon an erroneous statement of fact. This contention apparently is made because of a misunderstanding or a misreading of the Opinion of said Court. The Court, in its Opinion, referring to the conduct of Ray Gilliland with Petitioner, quoted the following language:

> "Stayed with Appellant all night at the Paradise Valley Guest Ranch."

Petitioner argues that this was taken from the Blanche Lampert statement. Petitioner is in error. The language was taken from the Respondent's (Appellee's) Brief in the Court of Appeals, page 14, wherein the following statement is made:

> "That Gilliland stayed with Appellant all night at the Paradise Valley Guest Ranch."

The Court's statement is true, and the accuracy thereof is found in the following excerpts from the record of the testimony of Blanche Lampert [Rep. Tr. p. 221, line 3, to p. 222, line 6]:

> "Q. By Mr. Wolfe: Now, do you know of any incident where Faye Lyons, as to your own knowledge, stayed with Mr. Gilliland at the Paradise Valley Ranch House? * * * A. Yes.
>
> Q. By Mr. Wolfe: When was that? A. When I first went there.
>
> Q. All right. Will you describe what happened? A. Well, Judge Blake and his wife and

Phil Kent and his wife and Faye and Mr. Gilliland had a steak dinner at the Gilliland Home. And Mr. Gilliland got very obnoxious, and Faye asked him to take her home to the Paradise Guest Ranch. And he did. And he didn't come back.

Q. Do you know of your own knowledge that he didn't come back to the house that night? A. Yes.

Q. Did you see him the next morning? A. Yes.

Q. Was he driving a car at that time? A. No, not right at the time.

Q. Did you see from where he came? A. Yes.

Q. Where did he come from? A. Faye's room.

Q. And where was that? A. Paradise Valley Guest Ranch.

Q. About what time of the morning? A. About a quarter to 8:00. * * *"

The Court of Appeals was quoting the statement made in the Respondent's (Appellee's) Brief as supported by the foregoing record.

Answer to Petitioners Statement re First Appeal.

In further support of her Petition herein, Petitioner quotes from the Opinion of the Court of Appeals, in the first appeal, inferring that the said Court stated as the law of the case that there was not sufficient evidence of good faith and lack of malice, as required by the statute to establish the defense of privilege. This, however, does not appear from the Court's Opinion in that appeal. The only thing involved in

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the Opinion in said first appeal, was the question of the jurisdiction of the District Court to grant the motion for a new trial. The Court of Appeals held that the District Court did have jurisdiction. The quotation set forth in the Petition for Writ of Certiorari is taken out of context. What the Court actually said in that particular paragraph was as follows:

> "It is reasonable to assume that the lower court weighed and considered the evidence of truth presented at the trial in connection with the second cause of action, but did not limit its consideration to Appellant's knowledge at the time of publication. The ultimate basis for the order granting the new trial, then, would be the lack of sufficient evidence to establish good faith and lack of malice as required by statute. Insufficiency of evidence, of course, was the very ground urged by Appellee in her motion, quoted above. The order, following the grounds stated in the motion, could not stem from the court's own initiative and would be timely."

The Court was not passing upon the merits. It was assuming that the lower court did or did not do certain things, and under such an assumption it held that the granting of the motion was within the jurisdiction of the Court.

Petitioner's Reasons for Granting Writ Are Insufficient.

Petitioner sets forth under the heading, "Reasons for Granting The Writ," three different contentions.

Petitioner's first reason is, that the Opinion of the United States Court of Appeals is at variance with the law of the State of California, which holds that only matters known to the libelant at time of the libel are available in the defense of privilege. Respondent hereinbefore has fully answered this contention of the Petitioner and has set forth a statement of information and matters known to Respondent, at the time of the alleged libel, and which the jury found were sufficient to support Respondent's defense of privilege.

The Court of Appeals did not, as Petitioner contends, hold that "matters learned later and after the libel," were available to Respondent in her defense. On the contrary, the Court of Appeals specifically stated that, "Only evidence known by Appellee [the Respondent here] at the time of publication can be now considered." (*Lyons v. Gilliland,* 303 F. 2d 452-453.) In view of this statement of the law, it is obvious the Court followed it.

For her second reason, the Petitioner asserts that the United States Court of Appeals ". . . erroneously holds that proof of propensity by one only of the parties, plus opportunity, will support a legal inference of adultery." Respondent respectfully submits that the United States Court of Appeals made no such statement. The issue of propensity was irrelevant. On the appeal there was no issue or question of the truth or falsity of the charge of adultery. The only issue

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upon the appeal was the sufficiency of the evidence to establish the defense of privilege. However, if propensity was relevant, the record of the evidence pertaining to the Petitioner's association with Respondent's husband, Ray Gilliland, contained proof pertinent to her propensity for the conduct involved. For example, such testimony as: she admitted that she stayed overnight in a hotel with Ray Gilliland in rooms that had connecting doors [Rep. Tr. p. 75, lines 5-11, and p. 79, lines 8-16]; she testified, "that it didn't make any difference * * * whether the rooms in the motels and hotels," that she and Mr. Gilliland occupied had interconnecting doors or not [Rep. Tr. p. 120, lines 11-17]; that she took an automobile trip with Gilliland from Scottsdale, Arizona to Miami, Florida, of from seven to ten days, and they stayed overnight in the same hotels and motels along the way, the names of most of which she could not remember [Rep. Tr. p. 75, lines 5-11; p. 77, lines 10-19; p. 80, lines 8-20; p. 84, lines 7-19; and p. 91, line 8, to p. 93, line 11].

Petitioner testified she did not know how they registered at the Fort Worth Hilton Hotel [Rep. Tr. p. 83, lines 5-10].

There was evidence that Petitioner permitted Gilliland to stay all night with her in her room at the Paradise Valley Guest Ranch [Rep. Tr. p. 221, line 3, to p. 222, line 6].

There was evidence that she accepted money from Gilliland [Rep. Tr. p. 227, line 13, to p. 228, line 20]; also an airplane ticket [Rep. Tr. p. 102, lines 16-18].

This evidence and additional evidence of similar conduct goes directly to the establishment of "propensity" on the part of Petitioner.

For her third reason, Petitioner contends that the United States Court of Appeals acted under a mistake of fact. In support of this contention Petitioner states that the Court, in its Opinion, purports to quote from the Blanche Lampert statement, as follows: "stayed with Appellant all night at Paradise Valley Guest Ranch." The Court of Appeals in its Opinion stated that Petitioner and Gilliland stayed all night together at the Paradise Valley Guest Ranch. As shown hereinabove, the Court, however, did not purport to quote from the Blanche Lampert statement. The accuracy of the quotation is fully supported by the Reporter's Transcript [Rep. Tr. p. 221, line 3, to p. 222, line 6].

Petitioner says that the words of Blanche Lampert's statement were actually "stayed at Paradise Valley Guest Ranch when Appellant was there," and concludes that the Court of Appeals had misquoted from the statement of said witness. Petitioner has misread and misunderstood the Opinion of the Court of Appeals.

Petitioner further states in her Petition that: "Three times in the decision of the Court of Appeals there is quoted evidence which was not known to the libelant at the time of the libel and that this evidence, not known to the libelant at the time of the libel, is quoted as a basis for and in support of its decision on the issue of privilege." As has already been pointed out, the United States Court of Appeals did not quote evidence not known to Respondent at the time of the alleged libel in support of her defense of privilege, and did not misquote any of the testimony of the witnesses. The pertinent evidence of the facts known to

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Respondent is hereinabove set forth in detail. These facts were more than sufficient to support the finding of the jury that Respondent had reasonable and probable cause to believe the truth of her allegations in her action for divorce.

Conclusion.

Petitioner has failed to present any reason why a Writ of Certiorari should issue.

Respectfully submitted

GEORGE R. LARWILL,

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THOMAS A. WOOD,

Attorneys for Respondent.